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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 745

E. R. DAUGETTE, and E. R. DAUGETTE
and MARY DAUGETTE,
Petitioners

Versus

GEORGE D. PATTERSON, District Director of
Internal Revenue, for District of Alabama

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above cause.

OPINION BELOW

The District Court did not file an opinion in the case. The opinion of the Court of Appeals in the case (Appendix A, infra) is reported 249F-2d.

JURISDICTION

The judgment of the Court of Appeals below was entered on December 26, 1957. Jurisdiction of this Court is invoked under 12 U.S.C., Section 1254.

QUESTION PRESENTED

Whether an informal adjustment of income taxes made in the form of a waiver of restrictions on assessment and collection of a deficiency signed by taxpayers and by the Associate Chief, Appellate Division, Atlanta Region, Internal Revenue Service, containing an agreement by taxpayers not to file a claim for refund, gives rise to an equitable estoppel barring recovery of an overpayment of taxes in a civil action on a claim for refund filed by taxpayers after the expiration of the period of limitations on assessments?

STATUTES AND REGULATIONS INVOLVED

SEC. 3760. CLOSING AGREEMENTS.

(a) Authorization.—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) Finality.—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by an officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance

therewith, shall not be annulled, modified, set aside, or disregarded.

(26 U.S.C. 1952 ed. Sec. 3760).

SEC. 3761. COMPROMISES.

(a) Authorization.—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense, and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record.—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with the statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amounts actually paid in accordance with the terms of the compromise.

(26 U.S.C. 1952 ed. Sec. 3761).

STATEMENT OF THE CASE

The actions in the District Court for the Northern District of Alabama were brought by Petitioners under Title

26 U.S.C. 1340 to recover overpayment of federal income taxes for the years 1947 and 1949, alleging that the sums claimed were illegally and erroneously collected from Petitioners by the Director of Internal Revenue for the District of Alabama. The basis for the collection was the determination by the Commissioner of Internal Revenue that 97,287 shares of Class "E" common stock of Larkway Gardens Company, Inc., issued to Petitioners during the year 1947 had a fair market value of 20c a share, and that 250 shares of Class "B" stock of South Park, Inc., made out to Petitioner but never issued, had a fair market value of $2,500.00. Petitioners contended below that the value of the stock during the respective tax years was zero, and introduced substantial evidence in support of this contention.

The stock in each instance was builder's stock subordinated to other classes of stock, and redeemable by the issuing corporation for a total consideration of one dollar, if the building was completed according to plan and the builder paid. The stock had no equity value and no fair market value during the tax year involved. The Government presented no valuation witnesses, offering evidence directed primarily at the estoppel defense. The majority opinion below found that "If the Appellants are to prevail it must appear from the evidence that the stock had no value," (R248), but, despite taxpayers' evidence of no value, upheld the trial court's denial of the jury trial demanded on this issue.

The record shows that Internal Revenue Agent Dendy in his revenue agent's report attached to a 30-day letter issued by the Commissioner of Internal Revenue to Petitioners, proposed a deficiency for 1947 of $61,805.96 and a penalty of $3,090.30. For the year 1949 he proposed a deficiency of $33,291.96, and a penalty of $1,664.60. In the 1947 deficiency the agent proposed to value the 97,287

shares of Larkway Gardens at face value, namely $1.00 per share. In the 1949 deficiency the agent proposed to value the 250 shares of South Park at $100.00 per share. The penalty in each case was the 5% negligence penalty.

The proposed additional tax for the two years, 1947 and 1949, standing alone, with penalty was $99,852.82, not counting interest for about six years.

Petitioners duly protested the proposed deficiencies and a hearing was accorded on the protest before Conferee Childree of the Appellant Division, Internal Revenue Service. What took place at the hearings on the protest is summarized in the testimony of the witness Bainbridge, a practicing attorney in Birmingham for thirty-five to forty years, who represented Appellants at the hearing. He testified, R. 181:

"Q. Suppose you tell us everything that was said by Childree to Daugette in your presence, or by Childree to you, in each of the conferences leading up to the execution of defendant's exhibits 2 and 3.

A. On both conferences I discussed with Mr. Childree the fact that Mr. Daugette agreed to surrender that stock for one dollar when it was issued, and that is all he would get out of it. And I told Mr. Childree the Government should not attempt to tax Mr. Daugette on something that he really was not entitled to keep and that he was bound to surrender for one dollar. And I said furthermore the stock had no value on September 12 whatever. Whatever date it was issued it had no value. And I said 'Certainly you ought not to tax a man for something he didn't get and try to collect a tax he didn't owe.' I said, 'He had an agreement'. 'You have your affidavits. We have had them in the file that we have submitted. You have the letter of September the 12th which shows he agreed to surrender for one dollar, and that is all he was entitled to on the stock'. I said, 'Furthermore the evidence here shows that the stock had no value on

the date it was issued.' Mr. Childree said, 'I know that is true but I cannot overrule Mr. Dendy entirely, the total assessment he made'. x x x

Q. Did they agree to reduce that assessment anything whatsoever unless the taxpayer signed the Exhibits 2 and 3?

A. Unless that agreement was made Mr. Childree said Mr. Dendy's assessment would have to stand."

The testimony of the taxpayer Daugette was to similar effect. He also testified: R. 188.

"Q. Did you tell them in that conference that that stock, 97,285 shares, that you were under a binding duty to surrender it back for a dollar?

A. Yes, sir.

Q. And that you did!

A. We furnished the building contract showing $34,000 and we told them we had surrendered it.

Q. And then—

A. He said 'Well I can't overrule Dendy altogether. It has gone too far. We have to make some sort of adjustment and the best we could do or decide on was 20 cents, and South Park 10 cents. That figure was just pulled out of the air.'

After the hearings Treasury Forms 870A, adjusting the tax accordingly, were executed by taxpayers and by the Associate Chief, Appellate Division, Atlanta Region, Internal Revenue Service. The pertinent content of the form is as follows:

"Pursuant to the provisions of section 272 (d) of the

Internal Revenue Code, or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 272 (a) of the Internal Revenue Code, or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies in tax with interest as provided by law.

This offer is subject to acceptance by or on behalf of the Commissioner of Internal Revenue. It shall take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it shall have no force or effect.

If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened nor shall any claim for refund be filed or prosecuted for the year (s) above stated (other than for the amounts of the overassessment shown above), in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations, and the taxpayer also agrees: (1) to make payment of the above deficiency, together with interest, as provided by law, promptly upon receipt of notice and demand from the District Director of Internal Revenue, and not file an offer in compromise respecting such liability, and (2) upon request of the Commissioner to execute at any time a final closing agreement as to the tax liability, on the foregoing basis, for said year (s) under the provisions of Section 3760 of the Internal Revenue Code."

"The execution and filing of this offer will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax."

Appellants thereafter paid in the deficiencies stated in

the waivers, in August 1954, and filed timely claims for refund thereon in September 1955. Waivers extending the statute of limitations to June 30, 1955 are in evidence.

The actions were timely filed more than six months from date of filing of claims for refund, with demand for jury.

At the conclusion of the evidence, the trial judge directed a verdict for defendant, basing his action "purely upon estoppel."

From the final judgments, entered upon jury verdict directed by the Court on September 12, 1956, after plaintiffs' motions for new trial were overruled, plaintiffs duly appealed. The Court of Appeals for the Fifth Circuit, one Judge dissenting, affirmed the judgment.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with decisions of other Courts of Appeal on the same matter, and has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The decisions referred to are:

Botany Worsted Mills v. U. S., 272 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379.

Bennett v. United States, 7 Cir. 1956, 231 F. 2d 465.

Joyce v. Gentsch, 6 Cir., 1944, 141 F. 2d 891.

Here, as in the *Botany Mills* case an attempted settlement of an income tax dispute was made by subordinate officials in the Bureau of Internal Revenue. Holding that such an informal adjustment of taxes as there made was not binding on the taxpayer, the Court said that "Congress

intended by the statute to prescribe the exclusive method by which taxes could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary and did not intend to entrust the final settlement of such matters to the informal action of subordinate officials in the Bureau." 278 U. S. at 288. The failure of the taxpayer to live up to the "gentlemen's agreement" reached with such subordinate officials for settlement of the controversy was held to be "not adequate ground for any claim for estoppel by the United States." 278 U. S. at 289.

The position of Petitioners here is not materially different in anywise from the taxpayer in the *Botany Mills* case, with the possible exception of the fact that the statute of limitations on assessment had run prior to the filing of the claim for refund. This fact has been held both by the Sixth Circuit and by the Seventh Circuit insufficient to give rise to an equitable estoppel.

In the *Joyce* case the taxpayer agreed not to file any claim for refund for the years covered in waiver of restrictions signed by him and by the Deputy Commissioner. The Sixth Circuit held that the filing of the suit after the statute had run did not constitute any misrepresentation of fact upon which the Government relied or any showing of damage to the Government upon which the claim of estoppel could be invoked. The Court further pointed out the availability to the Government of the defense of recoupment, and that "such a defense is never barred by the statute of limitations so long as the main action itself is timely." 141 F. 2d at 896.

The Seventh Circuit in the *Bennett* case held that the defense of equitable estoppel there advanced by the Government, based on the execution of similar waiver and the filing of the claim for refund after the statute of limitations had run for the assessment of the deficiency, did not bar

taxpayer's action on the claim. There the Court pointed out that Congress mandated the specific process by which the finality of closing settlements should be achieved, and that nothing short of action in accordance with the statute could vitalize the waiver into a binding agreement sufficient to form the basis for an equitable estoppel. As Circuit Judge Rives points out in his dissenting opinion below, taxpayer's promise not to file a claim for refund was not a fact on which the Commissioner had a right to rely "because he knew that the taxpayer's promise had not been accepted by the Secretary and was not legally binding." Appendix A, page 12.

The conflict in the Courts of Appeals on this important question of federal law should be settled by this Court.

Conclusion

This petition for a writ of certiorari, accordingly, should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Certiorari by mailing a copy thereof, air mail, postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and to Charles K. Rice, Assistant Attorney General, Department of Justice, Washington 25, D. C.

This the 21st day of January, 1958.

WINSTON B. MCCALL
Of Counsel

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16485

F. R. DAUGETTE, and F. R. DAUGETTE and MARY E. DAUGETTE,

Appellants,

versus

GEORGE D. PATTERSON, District Director of Internal Revenue, for District of Alabama,

Appellee.

Appeals from the United States District Court for the Northern District of Alabama.

(December 26, 1957.)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: In an action for a Federal income tax refund brought by the appellant taxpayers against the District Director of Internal Revenue, the district court directed a verdict for the Government. F. R. Daugette was engaged in the construction and

building business. Out of this business arose the transactions which give rise to this controversy. His wife, Mary E. Daugette, was a plaintiff in the district court and is an appellant here only because she and her husband filed joint tax returns for the years involved.

In 1947 Daugette and others organized Larkway Gardens Corporation for the purpose of acquiring land and having apartment buildings erected on it under the National Housing Act as amended, 12 U. S. C. A. §1701 et seq. Its charter provided for the issuance of common stock of five classes designated as "A", "B", "C", "D" and "E". 97,285 shares of the Class E stock of the par value of one dollar per share were authorized and it was provided the amount of capital with which the corporation should commence business was $146,185. The charter provided that Daugette should receive all the Class E stock. The subscriptions to the stock of Larkway Gardens, forming an exhibit to its corporate charter, recited that all subscriptions were "to be paid in cash, or real property, or services, rendered or to be rendered." Daugette agreed to construct the apartment units for Larkway Gardens. He entered into two contracts. One of these was a lump-sum contract on an F.H.A. printed form. By it Daugette agreed to do the work for $1,445,413, and in addition thereto as a fee the 97,285 shares of Class E stock of the par value of a dollar a share. On the basis of construction costs of $1,445,413, a builder's fee of $97,285, and an architect's fee of $37,302, aggregating $1,580,000, an F.H.A. insured mortgage in the latter amount was given by the First National Bank of Birmingham. The total amount of the

loan as finally made was $1,595,000. At or about the same time as the making of the construction contract on the F.H.A form, the other construction agreement was executed. By it Daugette agreed with Larkway Gardens to do the work at cost plus a fixed fee of $34,000. The agreement recited that any difference between the F. H.A. loan and the cost, builder's fee and expense should be paid to the stockholders of Larkway Gardens. There was introduced in evidence an undated letter of Daugette to Larkway Gardens saying that he would "surrender, transfer and assign" the Class E stock to the corporation on demand. In October of 1948, the year after the stock was issued to Daugette, the certificate was surrendered "for cancellation and reissuance". The Class E stock was reissued to the holders of the Class A stock pro rata. There was testimony that the Class E stock was to be surrendered for the benefit of the Class A stock when the project had been completed and the $34,000 had been paid. The president of Larkway Gardens testified that the Class E common stock "was issued according to the set-up of F.H.A. to complete the equity in the corporation in the name of Daugette". The president of Larkway Gardens was unable to recall that F.H.A. was informed of the agreement to sell or surrender the stock to the company for a dollar.

The taxpayer, F. R. Daugette, entered into another such deal with a corporation of the name of South Park, Inc. This corporation's books listed a liability of $25,000 for 250 shares of its Class B $100 par stock and showed this stock as being issued to Daugette in

1949. A certificate for this stock was completed but remained in the stock book.

The Internal Revenue Agent who examined Daugette's Federal income tax returns for 1947, 1948 and 1949 proposed substantial deficiencies of tax and negligence penalties. By far the greater part of the proposed deficiencies resulted from the inclusion as income of the Larkway Gardens Class E stock in 1947, and the South Park Class B stock in 1949, at the par value of these shares. Following the issuance of the so-called "thirty-day letter" conferences were had by Daugette and his attorney and accountant with representatives of the Internal Revenue Services. The contentions of Daugette and those of the Commissioner were stated and discussed. Proposals and counter-proposals were made. A settlement was reached. Under the terms of the settlement the Larkway Class E stock was valued at twenty cents per share instead of a dollar per share as proposed, the South Park Class B stock was to be valued at $10 per share rather than $100 per share as proposed, the negligence penalties were to be eliminated, and some other issues were conceded by Daugette to the Commissioner. For each of the disputed years Daugette filed an "Offer of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment" on Treasury Form 870-AD. By these instruments Daugette offered to accept as correct assessments in the amount there set forth which were the same as had been determined by the settlement. In these forms it was provided:

"This offer is subject to acceptance by or on behalf of the Commissioner of Internal Revenue. It shall take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it shall have no force or effect.

"If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened nor shall any claim for refund be filed or prosecuted for the year(s) above stated (other than for the amounts of the overassessments shown above), in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations; and the taxpayer also agrees: (1) To make payment of the above deficiency, together with interest, as provided by law, promptly upon receipt of notice and demand from the District Director of Internal Revenue, and not to file an offer in compromise respecting such liability; and (2) upon request of the Commissioner to execute at any time a final closing agreement as to the tax liability, on the foregoing basis, for said year(s) under the provisions of section 3760 of the Internal Revenue Code. [1939]"

At the bottom of these forms is a note which reads:

"Note.—The execution and filing of this offer will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax."

The offers were accepted for the Commissioner by the Associate Chief of the Appellate Division of the Internal Revenue Service at Birmingham. The assessments were made in the amounts specified in the offers and payment was made by Daugette. By waivers previously executed the period of limitations for the assessment of the tax had been extended to June 30, 1955. On September 12, 1955, Daugette filed claims for refunds asserting that the Larkway Gardens Class E stock was not additional compensation and had no value and that the South Park Class B stock had no value and was never issued to him. Suits for refund were commenced in March of 1956. The Director asserted that the Commissioner had relied to his detriment upon the offers and that Daugette was estopped to assert the claims which he attempted to put forward. The court directed a verdict for the defendant Director sustaining his defense of estoppel, and from an adverse judgment Daugette has appealed.

Before us the appellants urge that equitable estoppel was not a defense which the Government could assert, that if such defense could have been raised it should have been submitted to the jury; that the Revenue Agent had been guilty of malfeasance in procuring the execution of the offers and the right to reopen on the ground of malfeasance should have been submitted to the jury; and that the undisputed evidence required a finding that the stocks had no value and hence a verdict for Daugette should have been directed.

The appellants lean heavily upon *Botany Worsted Mills v. United States*, 278 U. S. 282, 49 S. Ct. 129, 73

L. Ed. 379, and from the opinion there they quote the following:

> "We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in the particular mode, it includes the negative of any other mode."

In the Botany Worsted Mills case we also find this language:

> "And, without determining whether such an agreement, though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel, it suffices to say that here the findings disclosed no adequate ground for any claim of estoppel by the United States."

Thus the Botany Worsted Mills case does not prevent the United States from successfully interposing the doctrine of equitable estoppel against the repudiation by a taxpayer of his representations in an income tax matter. See *R. H. Stearns Co. v. United States*, 291 U. S. 54, 54 S. Ct. 325, 78 L. Ed. 647. When, following the settlement, the offers were submitted the statute of

limitations had not run against the Government. When the claims for refund were filed and the suit was commenced the statute had run. The Government, relying upon the representations that no refund would be claimed and no suit to recover would be brought, lost its right to assess deficiencies.

The applicable principle has been thus stated:

> "Compromises are a matter of contract by which the status of parties is changed; and the principles of estoppel have application in connection therewith. Where a taxpayer receives and retains the benefits flowing to it from a compromise of its tax liability, the taxpayer, after the statutory period for the collection of the tax has expired, is estopped from repudiating such part thereof as it contends to have been less favorable to it than the facts or the law warranted." 9 Mertens, Law of Federal Income Taxation 472, 473, §52.20.

The Court of Claims, in a case with facts similar to the one before us, said:

> "At the time the agreement in this case was executed the statute had not run on the collection of further deficiencies, but when the claims for refund were filed the statute had run. It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed. A clear case for the application of the doctrine of estoppel exists and should be applied." Gug-

genheim v. United States, Ct. Cls. 77 F. Supp. 186, cert. den. 335 U.S. 908, 69 S. Ct. 411, 93 L. Ed. 441, reh. den. 336 U.S. 911, 69 S. Ct. 513, 93 L. Ed. 1075. See also Rubel Corporation v. Rasquin, E.D.N.Y. 1942, 43 F. Supp. 111, aff. 132 F 2d 640, Schneider v. Kelm, D. Minn. 1956, 137 F. Supp. 871, aff. 237 F. 2d 721. Cf. Walker v. Alamo Foods Co., 5th Cir. 1927, 16 F. 2d 694, cert. den. 274 U. S. 741; Lucas v. Hunt, 5th Cir. 1930, 45 F. 2d 781.

In *Joyce v. Gentsch*, 6th Cir. 1944, 141 F. 2d 891, cited by appellants the form there used had a provision expressly reserving the right to assess a further deficiency, a clause not in the form signed by the appellant. This factual difference distinguishes the Joyce case from the one before us. The opinion in *Bennett v. United States*, 7th Cir. 1956, 231 F. 2d 465, also relied upon by appellants, contains too little factual statement to permit comparison with the case we decide and hence we cannot definitely say whether it is opposed to the view we take. It cites and follows *Botany Worsted Mills v. United States*, *supra*, and refers to no other precedent or authority so we assume that its facts brought it under the rule announced in that case rather than under an exception to it.

The appellants would have us say that, if the equitable estoppel doctrine would otherwise apply, it cannot be invoked by the Government because of "unclean hands" and that malfeasance of the Government agents provided a basis for asserting a claim for refund. The unclean hands and malfeasance contentions are founded

upon the assertion that the Larkway Gardens and South Park stock had no value and that the Government agents, knowing it had no value, gave Daugette a Hobson's Choice of paying the amounts demanded or being bankrupted by the loss of credit which would follow a deficiency assessment of the amount the Government proposed. The Board of Tax Appeals, now known as the Tax Court, was created to provide for tax determinations prior to payment. *Newsom v. Commissioner*, 22 T. C. 225. The appellants, quoting from *R. H. Stearns Co. v. United States, supra*, remind us of "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." With such doctrine we are in full accord upon principle as well as upon precedent and from such doctrine stems the rule that guides us in our consideration of this appeal. If the appellants are to prevail it must appear from the evidence that the stock had no value.

There was a representation to the Federal Housing Administration by Daugette and his associates in promoting the Larkway Gardens project that he had subscribed for Larkway Gardens stock of the par value of $97,285. The corporation showed the stock as a liability at its par value and its balance sheet showed offsetting assets to balance. Whether the issuance of the stock pursuant to one of the two construction contracts as a builder's fee was as a device designed, as appellants contend, as nothing but window dressing required by F.H.A. or whether there was some less laudable purpose we need not decide. It is enough for us to say that the Government's agents were justified from these and

other facts before them in believing that the stock had substantial value, and it is not made to appear that they had any different belief. The same is true as to the South Park stock. The fact that the executed certificate was not taken from the stock book does not show that the stock was unissued. The records of the company showed it as outstanding.

Unless those representing the Government had no reasonable ground for believing that the stock had substantial value, their bad faith is not shown. If they had somewhat mistaken ideas as to the amount of the value, there might be some ground for questioning their good judgment but nothing in the case, in our opinion, justifies the questioning of their good faith.

The case here is no stronger for the appellants than in *Baldwin v. Higgins*, S.D.N.Y. 1937, 19 A.F.T.R. 1241, aff. 100 F 2d 405. It was said there and can be said here, "Furthermore it would seem unconscionable and inequitable to permit the plaintiff to sustain a recovery based on his own broken promises." The judgment is

AFFIRMED.

RIVES, Circuit Judge, Dissenting:

The holding in this case is, I think, contrary to the legislative policy that there can be no compromise of a tax claim by the Commissioner of Internal Revenue unless assented to by the Secretary of the Treasury. Sections 3760 and 3761, Internal Revenue Code of 1939; Sections 7121 and 7122 of the Internal Revenue Code of 1954; *Botany Mills, v. United States*, 278 U.S. 282, 289. The Commissioner or his representative should not be permitted by indirection to usurp the functions which Congress has vested in the Secretary or his delegate. To allow that to be accomplished, first by tacit compliance of the parties with an agreement of compromise not approved by the Secretary and then by the device or theory that the taxpayer is estopped to deny the compromise or to file or prosecute a claim for refund contrary to his promise which had not been accepted by the Secretary, and hence was not legally binding, seems to me wholly impermissible.

No misrepresentation as to the value of the stock in question was made by the taxpayer or relied on by the Government. The only misrepresentation made by the taxpayer was his promise not to file or prosecute a claim for refund. Assuming that that was a misrepresentation of an existing fact, it was not a fact on which the Commissioner had a right to rely because he knew that the taxpayer's promise had not been accepted by the Secretary and was not legally binding.

Suggestions have been made that it is necessary or desirable to relax the requirements of the statute,[1] but that is a matter for the consideration of Congress,[2] and administrative officials should not receive the approval of the courts for practices and policies which have the effect of defeating the clearly expressed will of Congress.

There is hardly any subject connected with our Government more necessary to be strictly limited, regulated and safeguarded than the authority to compromise tax claims. Congress is the only constitutional body which can delegate that authority. The statute is, of course, not subject to change by the administrative authorities or by the courts and it should not, I submit, be subjected to a process of administrative and judicial erosion. I therefore respectfully dissent.

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1 "There are several thousand cases each year in which there are proposed deficiencies and which are suitable material for a formal closing agreement such as will preclude the reopening of the question of tax liability under §3760 of the Internal Revenue Code, and there are numerous cases in which a final compromise agreement under §3761 would be the ideal way of closing the matter, but the administrative burden placed on the Secretary and Undersecretary of the Treasury by these statutes makes it impossible for them to handle more than a small proportion of the cases and the remainder must be closed by agents not authorized by law to enter into binding agreements. The Commissioner has attempted to devise an informal type of agreement which will be binding on both parties and end controversies, but without success. See Dean Griswold's article in 57 Harv. L.Rev. 912." Annotation 11 A.L.R. 2d 903, 913. Many cases are collected in that annotation and the supplement service thereto and in 9 Mertens Law of Federal Income Taxation, Chap. 52.

2 The sections were materially changed when brought forward into the 1954 Internal Revenue Code.